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In The

Supreme Court of the United States

October Term, 1983

WILLIAM FOREMAN, VINCENT PILLETERS and TERRY WARDEN,

Petitioners,

vs.

HOWARD V. COLLINS,

Respondent.

and

UNITED STATES OF AMERICA,

Intervenor.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS SECOND CIRCUIT

JOHN D. DOYLE
MONROE COUNTY ATTORNEY

NIRA T. KERMISCH
Counsel of Record

307 County Office Building
39 West Main Street
Rochester, New York 14616
Telephone: (716) 428-5280

Counsel for Petitioners

Daily Record Corporation
Rochester, New York

(10471)

QUESTION PRESENTED

Whether the Magistrate's Act, 28 USC §636(c) is unconstitutional.

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The Petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on February 22, 1984.

OPINIONS BELOW

The following opinions and orders of the lower courts are included in the Appendix to the Petition:

1. Opinion of the United States District Court, Western District of New York rendered November 8, 1983.

2. Opinion of the United States Court of Appeals for the Second Circuit, rendered on February 22, 1984, in this action.

JURISDICTION

The opinion of the Court of Appeals was entered on February 22, 1984. Jurisdiction to review the judgment of the Court of Appeals is conferred on this Court by 28 U.S.C. §1254(1).

GOUNDS FOR REVIEW

The significance of this petition for writ of certiorari to the Court of Appeals for the Second Circuit is substantial. The question to be decided is whether Congress can authorize Article III judges to delegate the judicial power of the United States, including entry of final judgment to individuals who lack Article III attributes. At the present time, appeals dealing with the question of the constitutionality of 28 USC §636(c) are pending in most of the circuits and have been decided in three.

In August, 1983, a panel of judges in the Ninth Circuit declared the statute unconstitutional. On a rehearing *en banc*, however, the Ninth Circuit reversed itself, three judges dissenting,[1] and declared the statute constitutional. In addition, the Second and Third Circuits upheld the constitutionality of the statute.

An additional ground for review is that the Second Circuit's decision is also contrary to the court's holding in *Northern Pipeline Cons. Co. v. Marathon Pipeline Co.* 102 S.Ct. 2858.

STATEMENT OF THE CASE

In 1975, respondent, Howard V. Collins commenced a civil rights action against the petitioners. In July of 1981 Magistrate Maxwell contacted the attorneys for the parties and advised them that he was permitted to preside at trials and asked the attorneys whether they would consent to have the case tried before him. Neither attorney agreed at that time.

Magistrate Maxwell then followed that telephone conversation

[1] None of the judges who participated in the original decision, participated in the rehearing *en banc*.

with a letter, dated July 10, 1981, to which he attached consent forms. Again, the attorneys did not respond.

The letter was then followed by another telephone call from Magistrate Maxwell regarding the parties' consent to litigate before him. Eventually, in September of 1981 both parties' signed the consent to proceed before a United States Magistrate. Prior to the trial by Magistrate Maxwell, the petitioners attempted, on several occasions, to rescind their consent to have the trial conducted by the Magistrate, but their requests and motions were denied. A trial was then held in December of 1981 in which Magistrate Maxwell presided and a jury verdict was returned against the petitioners and for the respondent.

The petitioners appealed to the District Court which upheld the Magistrate's decision. Thereafter, petitioners moved for leave to appeal to the Second Circuit. The motion for leave to appeal was denied by the U.S. Court of Appeals in August, 1983.

Petitioners then moved in District Court to vacate the judgment on the ground that the judgment was void on the ground that 28 USC §636(c) was unconstitional. The District Court denied the motion and the petitioners then appealed to the U.S. Court of Appeals for the Second Circuit and argued that: a) the judgment was void because 28 USC §636(c) was unconstitutional; and, b) there was no voluntary consent to litigate the matter before Magistrate Maxwell. The Second Circuit upheld theconstitutionality of the statute, and found the consent to be voluntary.

In view of the fact that the question raised by this case is presently pending in almost all circuits in the nation, it appears that this is a very important question which should be determined by the Supreme Court.

Of the circuits which decided, the Ninth Circuit judges are divided on the question of the constitutionality, however, in the Third Circuit, two panels[2] held the statute to be constitutional.

[2] At least one of the judges who participated in the first panel also participated in the second.

SUMMARY OF ARGUMENTS

1. 28 USC §636(c) Is Unconstitutional.

Magistrates are not Article III judges and, therefore, may not enter final judgments.

Delegation of authority to magistrates to finally determine questions of law and enter final judgments alters the balance of powers of the three branches of government.

Magistrates are not "adjuncts" of the district court.

Magistrates who are appointed by judges and whose salaries may be diminished during their term are subject to pressures by the judiciary, executive and legislative branches of government.

Article III §1 establishes part of framework of government, rather than confers a personal right on the litigants.

2. Voluntary Consent.

Pressures by the courts and magistrates to litigate before a magistrate constitute coercion.

ARGUMENT FOR ALLOWANCE OF *THE WRIT OF CERTIORARI*

28 USC §636(c) IS UNCONSTITUTIONAL

The Second Circuit held that as long as the parties consent, the power to decide any civil case in the district courts of the United States may be exercised by individuals who are not Article III judges. The Second Circuit bases its holding on several assumptions which petitioners believe are erroneous. The first assumption is that under the constitutional system the provisions of Article III §1 confer a personal or due process right on the litigants rather than establish part of the framework of government. Based on this assumption, the court held that the parties can stipulate to permit a non-Article III individual to exercise the judicial power of the United States. The second assumption is that magis-

trates are "adjuncts" of the district court. The third assumption was that magistrates, who are appointed by the district court judges for a term of office, whose salaries may be diminished during their term, and those positions may be abolished, are not subject to pressures by the executive and legislative branches and have the independence that the Constitution is designed to ensure. The fourth assumption is that the consent to a trial before a magistrate is voluntary no matter what the pressures put upon the individuals to consent to trial and entry of final judgment by a magistrate, as long as such pressures are not open threats of delay, or costs.

MAGISTRATES LACK ARTICLE III ATTRIRUTES

United States Constitution, Article III, section 1 states:

> "The judicial Power of the United States, shall be vested in one supreme Court and such inferior Courts as the Congress may, from time to time, ordain and establish. The Judges, both in the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their services a Compensation, which shall not be diminished during their Continuance in Office."

The U. S. Supreme Court in the case of *Northern Pipeline Const. Co. v. Marathon Pipeline Co.* 102 S.Ct. 2858 decided that judges who are not Article III judges may not exercise certain powers. The court stated at page 2865:

> "The judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III. Those attributes are also clearly set forth:
>
> > 'The Judges, both of the Supreme and Inferior Courts, shall hold their Offices during good behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.' Art. III, §1.

> The 'good Behavior' Clause guarantees that Art. III judges shall enjoy life tenure, subject only to removal by impeachment. *Toth v. Quarles*, 350 U.S. 11, 16, 76 S.Ct. 1, 4, 100 L.Ed. 8 (1955). The Compensation Clause guarantees Art. III judges a fixed and irreducible compensation for their services. *United States v. Will*, supra, 449 U.S., at 218-221, 101 S.Ct., at 482-483. Both of these provisions were incorporated into the Constitution to ensure the independence of the judiciary from the control of the executive and legislative branches of government."

By contrast, federal magistrates are not appointed for life, must retire at age 70, may be removed from office and their office may be terminated if the judicial conference decides that the office is no longer needed. Neither are their salaries protected. Thus, the criteria applied in determining whether judges are Article III judges or not do not fit the magistrates, and there is no question that magistrates are clearly not Article III judges. *United States v. Saunders* 641 F.2d 659 cert. denied 452 U.S. 918.

Article III judges receive life tenure upon appointment, while magistrates are appointed for eight year terms, and must retire at age 70. The judges' salaries are protected while in office, while magistrates' salaries may be diminished by the judicial conference during their term, provided they do not fall below the magistrate's salary at the commencement of his term.[3] Additionally, magistrates may be removed from office during a term for incompetence, misconduct, neglect of duty or physical or mental disability, while a judge may be removed only by impeachment. A sitting magistrate's office may also be terminated if the judicial conference decides that the office is no longer needed. Of course, Congress can always repeal the Magistrate's Act if it so chooses.

The Second Circuit touched upon the Article III requirements in its discussion of the question of separation of powers, but did not address the serious problems which arise, nor did it address the question of the importance of an independent judiciary, which independence depends upon their security. The security

[3] Obviously, Congress can diminish their salaries at any time.

provided to members of the judicial branch helps to attract well qualified persons to the Federal bench and the guarantee of life tenure insulates the individual judge from improper influences not only by other branches, *but colleagues* as well, *Northern Pipeline* Id. at 2865 n.10., and thus promotes judicial individualism. The Federal Judicial was designed by the Framers of the Constitution to stand independent so as to maintain the checks and balances of the constitutional structure and also to guarantee that the process of adjudication itself remains impartial. The majority in the *Northern Pipeline* case stated at page 2864:

> "Hamilton explained the importance of an independent judiciary:
>
> "Periodic court appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to (the courts,) necessary independence".

Any appointment for a definite time or during good behavior does not give the appointee a vested right or interest in his office of which Congress cannot deprive him. Such appointment is a privilege revocable by the legislature at will. *Crenshaw v. U.S.* 10 S.Ct. 431, 432.

The magistrates, however, are appointed periodically by the district court and, therefore, there exists a danger not only of potential abuses of assignment power by individual judges who, in misguided attempts to expedite the business before them, might unwittingly delegate to magistrates responsibilities that are more properly discharged by the judge (Senate Committee on the Judiciary, S.Rep. No. 371, 90th Cong. lst Session, 25-27 as quoted in *T.P.O. Inc. v. McMillen* 460 F.2d at 357), but also there exists the clear danger that a magistrate, who is appointed by a judge to a term of office, will not deliver an unpopular opinion if the results of such decision were curtailments of his authority, future reference or failure to be reappointed.

Not only can magistrates not be reappointed by the district court judges, but their offices can also be terminated by the judicial conference and their salaries may be diminished during their term. Thus, magistrates' salaries may increase if their decisions are favorable but decrease if their decisions are unfavorable and the fear of such fluctuations in salary may influence their decisions. As the Framers stated:

> "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support . . . in the general course of human nature, a power over a man's subsistence amounts to a power over his will." The Federalist, No. 79 (A.Hamilton) page 491. (As cited in *Northern Pipeline Cons. Co. v. Marathon Pipeline Co.*, 102 S.Ct. at 2865.)

Unlike magistrates, Article III judges are appointed for life and their compensation is fixed and irreducible and both of the provisions were incorporated into the Constitution to ensure the independence of the judiciary from the control of the executive and legislative branches of the government.

Magistrates may also be called upon to determine the constitutionality of actions taken by the other branches of government. Inasmuch as magistrates depend on Congress and the judiciary, the exercise of judicial power by them places the constitutional system at risk.

The Second Circuit felt that authorizing magistrates to exercise the judicial power of the United States, does not affect the allocation of power between Congress and the District Courts. However, in the Magistrate's Act, Congress has delegated to judicial councils the power to create magistrate positions and thereby abdicated its constitutional responsibility. In actual terms, this abdication reduces the pressure on Congress to create more Article III judgeships, and increases the pressure on district courts to escalate the use of magistrates. (Dissent in *Pacemaker Diagnostic Clinic* slip opinion 2/16/84, p. 803).

The fundemental principles of the government as established by the Constitution is that the powers of the three branches of government be separate from one another.

James Madison, writing in support of the separation of powers in The Federalist No. 47, p. 299, stated that where the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator.

Justice Taft writing for the court in *Hampton & Co. v. United States* 276 U.S. 394, after discussing the general principle of the separation of powers stated:

> "(i)t is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President or to the judicial branch." *Id.* at 406.

The Magistrate's Act, however, transfers to the judicial conference the right to create positions which should be created by Congress.

Further, the Constitution does not permit imposing duties of nonjudicial nature on Article III judges, *United States v. Ferreira* 54 U.S. 40, *Hayburn's' Case* 2 U.S. 409, and it is clear that the opposite is also true, that the judicial power may not be conferred upon individuals who are not Article III judges.

Not only does the Magistrate's Act change the balance of power between Congress and the judiciary, it also removes the appointment power of the President and the confirmation power of the Senate pursuant to Article II §2. They are deprived of the opportunity to appoint those individuals whom they deem fit to exercise the judicial powers of the United States. There is no question that magistrates are officers of the United States as they exercise significant authority and, therefore, must be appointed in the manner prescribed by the Constitution. *Buckley v. Valeo* 96 S.Ct. 612, 685. Thus, the changes in the balance of power affect also the executive branch, not only the legislative branch.

It is accepted that rights created by Congress may be adjudicated before particularized tribunals created by Congress to perform the specialized adjudicative tasks related to that right. However, no comparable justification exists when the right being adjudicated is not of congressional creation. In such a situation substantial inroads into functions that traditionally have been performed by the judiciary cannot be characterized merely as incidental extensions of Congress' power to define rights that it has created. Rather, such inroads suggest unwarranted encroachment upon the judicial power of the United States which the Constitution reserves for Article III courts. *Northern Pipeline at 2878.*

42 USC§1983, which was the basis for the complaint in the case at bar, does not create a right, but creates a remedy when other rights have been violated, be they federal or state created rights, and thus adjudication of litigation based on 42 USC§1983 does not fall within the exception stated by the *Northern Pipeline* court.

The Second Circuit recognizes the problem, and also recognizes that the Supreme Court in *Northern Pipeline*, supra, and in *Raddatz* decided that magistrates can conduct part of the proceedings provided "the ultimate decision-making authority . . clearly remained with the district court" 458 U.S. at 79. Yet, it determined that even though "ultimate decision-making authority" is a sufficient condition for a finding that a challenged scheme does not offend the policy of separation of powers, it is not a necessary condition for such a finding. This analysis clearly fails to follow the rationale in *Northern Pipeline* and *Raddatz* which followed a long line of cases in which the court upheld the magistrates and special master's schemes only because the ultimate decision was left in the hands of Article III judges.

Concerns have been voiced by many regarding the question and the implications of judges controlling other judges outside

the appellate process. Judge Irving Kaufman of the Second Circuit, arguing that permitting judges to remove other judges from office frustrates judicial individualism, stated that judicial independence is most crucial and most vulnerable when the only hope of protection lies in clear rules setting forth the bright lines that cannot be traversed. Chilling Judicial Independence 88 Yale L.J. 681 751 (1979). The Supreme Court considered the issue in *Chandler v. Judicial Council* 398 U.S. 74 (1970). There, the court recognized the need to preserve the decision-making function independent of the influence of any other judge and this recognition was reflected in all opinions in the case. The majority in that case denied a district court judge's petition for extraordinary relief from a judicial council order, in which he had acquiesced, withdrawing case assignments. The chief justice wrote:

> "There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding the cases or in any phase of the decisional function." *Id.* at 84.

Justice Harlan's concurrence also noted the basic responsibility of judges for "final adjudication of lawsuits" *Id.* at 110 and Justice Douglass, in a dissent, stated:

> "Once a federal judge is confirmed by the Senate and takes his oath, he is independent of every other judge. He commonly works with other federal judges who are likewise sovereign." *Id.* at 136.

In our case, the Second Circuit, as did the majority of the Ninth Circuit, in the en banc decision, determined that even though magistrates are totally dependent upon other judges for their appointments and upon Congress and the judicial conference for their salary, they are still independent of any pressures. The *en banc* panel of the Ninth Circuit went even further. They determined that in order to overcome the Article III requirements, there must be both the appearance and the reality of control by Article III judges over the interpretation,

declaration and application of Federal Law, and that the required control must be more than simple appellate review. *Pacemaker's* majority opinion (p. 797 of slip opinion).

Such control over the magistrates removes any vestige of independence they may have, and together with the pressures of appointment and salary, clearly places in jeopardy their ability to render independent decisions.

Furthermore, Congress has the duty to vest the judicial power of the United States, and to vest the whole of the judicial power, which under the Constitution, must be vested in Article III judges. If this interpretation does not prevail, Congress could refuse to vest the judicial powers in Article III judges, and instead attempt to vest the power in magistrates who are obligated to Congress not only for their salaries but also for their positions.

Clearly, Congress, if it chooses, can impact on the judiciary by appointing a large number of magistrates over whom it will have control, rather than appoint independent and secure Article III judges, whom it cannot control, and thus frustrate the separation of powers which is the cornerstone of the Constitution.

MAGISTRATES ARE NOT ADJUNCTS OF THE DISTRICT COURT

The Second Circuit has implied in its decision that magistrates are adjuncts of the district court. The court compared magistrates to special masters to whom the district court judges may refer pending civil cases for taking evidence and conducting hearings; such special masters must file with the district court a report containing findings of fact and conclusions of law. In non jury cases, the district judge must accept the magistrate's findings of fact unless they are clearly erroneous (Federal Rules of Civil Procedure, §53(e)(2)). The master's

legal conclusions, however, are not entitled to special difference. *LaBoy v. House Leather Co.* 352 U.S. 249, 259 held, however, that reference to masters shall take place only under "exceptional circumstances". The Second Circuit, conceding that the analogy to masters is not perfect because masters cannot order the entry of final judgment, nevertheless implies that because the statute permits reference to masters upon consent of the parties that, therefore, reference to magistrates is also proper as they are adjuncts to the court. The Second Circuit, however, fails to explain how they arrived at the conclusion which is in direct contradiction to the decision in the *Northern Pipeline* case, supra.

The majority in the *Northern Pipeline* case defined and reiterated its view of the adjunct system. The court stated specifically that the functions of the adjunct must be limited in such a way that the essential attributes of judicial power are retained in the Article III court. The court then stated:

> "Thus, in upholding the adjunct scheme challenged in *Crowell*, the court emphasized that 'the reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function in this class of cases.' And, in refusing to invalidate the Magistrate's Act at issue in *Raddatz*, the court stressed that under the congressional scheme '(t)he authority - and the responsibility - to make an informed, final determination . . . remains with the judge' 447 U.S. at 682. . . the statute's delegation of power was therefore permissible since *'the ultimate decision is made by the district court'*." 447 U.S. at 683. [emphasis supplied]. *Id.* at 2876.

Interestingly, the majority of the *Pacemaker* case, supra, in an attempt to find the statute constitutional, stated that under 28 USC §636(c) Article III courts retain full authority over questions of law. Presumably, the majority was discussing appeals as during the trial conducted, or on motions, the magistrates decide all questions of law without reference to the Article III judge, and they further enter final decisions.

The question also arises whether Congress can authorize judges to delegate their duties to magistates.

The language of Article III §1 does not permit a delegation of powers by the judges to non-Article III individuals.

The Second Circuit determined, however, that reference to Magistrates under §636(c) does not violate the Article III ban against the delegation of judicial power to other than Article III judges.

The court attempts to justify its position by relying on the consent of the parties. However, if the Constitution bans such delegation, then the parties cannot, by consent, confer jurisdiction on the magistrates if none existed ab initio.

The Second Circuit, as does the majority in the *Pacemaker en banc* decision, relies on a line of old cases to support their position that delegation of judicial power to non Article III judges is permissible. The cases started with *Crowell v. Benson* 285 U.S. 22 through *U.S. v. Raddatz* 100 S.Ct. 2406. In the latter case, the court held that the most important factor in upholding the power of the magistrate to hold a hearing and present to the court the proposed findings of fact and law is that:

> (d)elegation does not violate Article III so long as the ultimate decision is made by the district court." (cites omitted) *Id.* 2416.

The Second Circuit concedes that none of the early cases touched upon the question of the delegation of judicial power which arises in this case. It did, however, discuss the decisions which address the constitutionality of reference of cases to magistrates. In support of its position, the Second Circuit cites *DeCosta v. CBS* 520 F.2d 499 cert denied 423 U.S. 1073, in which the First Circuit held that:

> "It is constitutionally and statutorily permissible to refer cases, with the consent of all parties, for 'initial decisions'." *Id.* at 507 - 508

There is no question that, by statute, it was permissible in 1975, as it is today, to submit matters to magistrates for initial decisions but not for final determination as is the case in this case. The Second Circuit also relies on *Muhich v. Allen* 603 F.2d 1247, a 1979 case which preceded the amendment to the Magistrate's Act, in which it was found permissible for a magistrate to try a civil case when the district court retained its jurisdiction over the litigation as it had the power to conduct a de novo review, and to invoke its exclusive authority to order the entry of final judgment. Thus, it is clear that all the cases support the proposition that reference to a magistrate for initial determination is permissible, provided that the ultimate decision and the entry of final judgment remain with the district courts. Thus, the Second Circuit, even though it rejects the reasoning in the cases which permit the delegation of power, and even though it acknowledges that the criteria in each and every one of those cases for upholding the constitutionality of the limited delegation to magistrates was upheld because the final determination remained with the district court, nevertheless stated that such condition was not relevant to the determination of the constitutionality of 28 USC §636.

Under 28 USC §636 the district court has no residual responsiblity for those cases which are referred to magistrates, and the magistrate then acts as would a judge who had been appointed by the President and confirmed by the Senate.

In *Northern Pipeline* the majority rejected an argument that Article III requirements are satisfied so long as some degree of appellate review is provided and determined that such argument is directly contrary to the text of the Constitution, and further stated that the constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication, and not only on appeal, where the court is restricted to

considerations of law, as well as the nature of the case as it had been shaped at the trial level. *Id.* at 2879, n. 34.[4]

Interestingly enough, the three circuits which upheld the constitutionality of 28 USC §636(c) relied on different and sometimes conflicting grounds. The Third Circuit in *Wharton-Thomas v. U/S.* 721 F.2d 922, held that the consent of the parties went not to the jurisdiction of the district court as an entity, but to the judicial officer within the court who conducted the trial and, therefore, it did not offend the Article III provisions. Furthermore, the Third Circuit in *Wharton-Thomas,* supra, completely ignored the decisions of the Supreme Court which dealt with the question of the independence of the judges. The Ninth Circuit, in the *Pacemaker* case, in the *en banc* decision held that because Article III judges provide continuous control over the magistrates, the authority remains in the District Court and thus does not offend the Article III requirements. The majority there went so far as to state that there must be active supervision by Article III judges over magistrates and that such continued and vigilant supervision by Article III judges is, of course, essential to the integrity of the system and they must be careful to guard against any compulsion to induce consent. As the dissent in that case points out, if the Article III judges had the time to closely supervise the magistrates as the majority thinks they should, they would not need the magistrates to conduct the trials as they then would have the time to try the cases themselves. As a practical matter, once a case is delegated to a magistrate, the Article III judge has no connection whatsoever with that case unless it comes before him on appeal, nor will the judge entertain any motions or any discussion of the case.

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[4] That question had been addressed in *Crowell* where the court rejected the argument and stated that "[t]o accept such a regime would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of bureaucratic character alien to our system, wherever fundamental rights, depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in fact finality in law." 285 U.S. at 57.

Thus, no supervision, continuous or otherwise exists by Article III judges. The Second Circuit did not follow either of the two opinions, but, rather, found that as magistrates are adjuncts of the district courts, the delegation of the power to enter final judgments does not offend the Article III requirements.

Prior to the 1979 amendment to the Magistrate's Act, magistrates were allowed to make findings of facts and law provided, however, that the final determination was made by the judge.

The 1979 amendment to the Magistrate's Act removed the authority of rendering the ultimate decision from the district courts and placed it in the hands of the magistrates, and thus the magistrates no longer act as adjuncts, as they were given the authority and the responsibility by statute to enter final judgment instead of the district court, and their powers, when conducting a trial, are the same as those of the district judge. Nor does the statute permit the district court to hold a de novo review of the proceedings before the magistrate. The *Northern Pipeline* court, however, reiterated the fact that "critical to the court's decision (in *Raddatz*) to uphold the Magistrate's Act was the fact that the ultimate decision was made by the district court" *Id.* 2877. If this important factor is eliminated, then the Magistrate's Act cannot be upheld.

POWER OF ARTICLE III JUDGES TO HEAR CASES IS PART OF THE FRAMEWORK OF GOVERNMENT NOT A LITIGANTS PERSONAL RIGHT

The Magistrate's Act of 1968, 28 USC §631-639, created magistrate's positions. The 1968 act created the positions with an eight year term of office and empowered district courts to appoint the magistrates. The act authorized the magistrates to perform the functions previously carried out by the U. S. com-

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missioners and to serve as special masters in civil actions, to assist the district court in pre-trial and discovery proceedings in civil and criminal actions, to make preliminary review of petitions for habeas corpus and to perform such additional duties as are not inconsistent with the Constitution and laws of the United States.

The 1968 Act also provided for the magistrate's removal during a term of office for incompetency, misconduct, neglect of duty or physical and mental disability. Only the judges of the district court in which the magistrate serves could exercise removal authority (28 USC § 631(h)), but the judicial conference could abolish the magistrate's position.

In 1976 Congress amended the Magistrate's Act, expanding the duties and powers of magistrates. The 1976 amendment empowered the magistrates to determine nondispositive pretrial motions, subject to review by a district judge, and also gave magistrates the authority to make findings and recommendations on dispositive pre-trial motions and in prisoner cases. A district judge would then conduct a de novo review of those portions of the magistrate's report or proposed findings or recommendations to which a party objected (28 USC §636(b)(1)).

In 1979 Congress enlarged the duties and powers of magistrates even further. It provided that, upon the consent of the parties, and when specially designated to exercise such authority by the district court in which he serves, a magistrate could also conduct all proceedings in a jury or non-jury civil action and enter final judgement, (28 USC §636(c)). When enacting the 1979 Magistrate's Act, Congress' object was "to amend the current jurisdictional provisions for U. S. Magistrates . . . in order to further clarify and expand the jurisdiction of U. S. Magistrates and improve access to the federal courts for the less advantaged." S. Rep. No. 74 96th Cong. lst Sess. I, reprinted in 1979 U.S. Code Cong. A.d. News 1469, 1469. It ap-

pears, therefore, that Congress attempted to create special judgeships outside the Article III framework for the benefit of the less advantaged, and sidestep the procedures contained in the Constitution.

The Magistrate's Act, 28 USC §631-639, authorizes the judicial branch to create new judicial offices, appoint those who will occupy the offices and then delegate to the appointees the authority to exercise the judicial power of the United States. (28 USC §636(c)).

The basis of the argument that parties, by consent, can waive their right to trial by an Article III judge is that the right to an Article III is a due process right and, therefore, waivable like any other due process right. The question, therefore, arises whether the right to an Article III judge is a due process right only, or whether it is part of the framework of government which cannot be waived, and, therefore, the consent of the parties cannot confer jurisdiction on the magistrate.

In *Glidden Co. v. Zdanok* 370 U.S. 530, the Court reviewed cases in which a judge of the court of claims sat by designation on a panel of the Second Circuit and a judge of the Court of Customs and Patent Appeals presided by designation over a trial in the Federal district court. The Court found no constitutional infirmity as it held that those courts has been reconstituted as Article III courts. The court indicated that Article I judges may not bind litigants in Article III no matter how fairly they run the proceedings. The plurality specifically praised the qualifications, standards and impartiality of the judges involved. It is clear that had the court considered that the right to trial before an Article III judge as only a due process right, the plurality would have terminated its discussion by noting the fair proceedings in the court below, and would not have gone on to determine that the proceedings were valid because the judges of the Court of Claims and the Court of Customs and Patents were designated as Article III courts. The

same conclusion may also be drawn from the Supreme Court's opinion in *United States v. Raddatz* 447 U.S. 667 where the court noted that having magistrates conduct suppression hearings satisfied due process by providing a hearing appropriate to the nature of the case. But the court did not terminate its inquiry there, but continued to discuss the Article III objections to magistrates holding such hearings, and the court, then, concluded that the Article III demands are satisfied where "the ultimate decision is made by the district court" *Id.* at 683. In the case at bar, the magistrate conducted the trial, instructed the jury on the law and entered the final judgment thus depriving the Article III judge of making the ultimate decision.

The cases thus make clear that a trial by Article III judge is more than a due process right but is part of the framework of government.

The language of Article III itself supports the position that it intended to create a frame of government rather than a personal right, and such frame of government cannot be altered by the parties' consent.

VOLUNTARY CONSENT

There is no question that 28 USC §636 demands that consent to trial by magistrates must be voluntary.

The question arises, however, as to what constitutes a voluntary consent.

The Second Circuit held that as long as there was no open threat of delay or costs, repeated calls by a magistrate and a written communication, do not constitute pressure on the litigants. Such position is unrealistic. A litigant, who keeps receiving communications from a magistrate, who invites the parties to litigate before him, on more than one occasion in the same matter, brings pressure on the litigant who is then hesi-

tant to refuse for fear of what might happen should the district judge be advised of such refusal. The district court can, in attempt to pressure trials before magistrate, deny the balking litigant adjournments, deny his motions, or otherwise create difficulties.

The majority in the *en banc* decision in the *Pacemaker* case and the Third Circuit in the *Wharton-Thompson* case recognized that pressure on parties to submit cases increases in direct proportion to the number of magistrate positions.

The House Report on the Act indicated that the intention was to reserve to Article III judges complicated matters (H. Rep. No. 1364, 95th Cong. 2nd Sess. 12 (1978).

The courts have been following this recommendation and assigned certain types of cases to the magistrate. This approach, however, does not comply with the intentions of the Framers of the Constitution that all cases be decided by Article III jduges, not only those which they deem more important.

It appears that Congress, in an effort to make the Federal Courts more accessible to a large number of people, has moved away from the intent of the Framers of the Constitution and created a bureaucracy which was not contemplated, and which applies pressures, directly or indirectly, on litigants to avail themselves of it.

Surely, a litigant faced, for example, with demands by a magistrate to litigate before him, will not dare to prejudice his case by refusing. No safeguards have been established to protect the one refusing from possible ramifications arising from such refusal. Inasmuch as no determination has been made as yet as to what constitutes coercion, the door is open to pressures to be applied to litigants.

CONCLUSIONS

The question of whether 28 USC §636(c) is constitutional, goes to fundamental questions of constitutional separation of powers and whether the judicial power of the United States may be delegated to non Article III individuals.

This very important question, presently pending in the majority of circuits merits a review by this court and the granting of the writ of certiorari.

JOHN D. DOYLE, MONROE COUNTY ATTORNEY

NIRA T. KERMISCH
DEPUTY COUNTY ATTORNEY
(Counsel of Record)

Monroe County Attorney's Office
307 County Office Building
39 West Main Street
Rochester, New York 14614
Telephone: (716) 428-5280

Counsel for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 693—August Term 1983

Argued December 12, 1983 Decided February 22, 1984

Docket No. 83-7938

HOWARD V. COLLINS,

Plaintiff-Appellee,

—and—

UNITED STATES OF AMERICA,

Intervenor,

—v.—

WILLIAM FOREMAN, VINCENT PILLETERS and TERRY WARDEN,

Defendants-Appellants.

Before:

FEINBERG, *Chief Judge*,
OAKES and PIERCE, *Circuit Judges.*

1827

Appeal from district court judgment denying appellants' motion to vacate judgment as void. Appellants argue that 28 U.S.C. § 636(c), which allows magistrates to conduct civil trials and enter final judgments upon the consent of the parties, is unconstitutional.

Affirmed.

ALFRED P. KREMER, Rochester, NY, *for Plaintiff-Appellee.*

MICHAEL F. HERTZ, Attorney, Appellate Staff, Civil Division, Department of Justice, Washington, DC (J. Paul McGrath, Assistant Attorney General, Joseph E. diGenova, United States Attorney, Peter R. Maier, Attorney, of Counsel), *for Intervenor.*

NIRA T. KERMISCH, Rochester, NY (John D. Doyle, of Counsel), *for Defendants-Appellants.*

FEINBERG, *Chief Judge*:

Defendants William Foreman, Vincent Pilleters and Terry Warden appeal from an order of the United States District Court for the Western District of New York, John T. Curtin, Ch. J., denying their motion under Fed. R. Civ. P. 60(b)(4) to vacate a judgment against them secured by plaintiff-appellee Howard V. Collins. The substantive issues on appeal are whether the provision of the Federal

Magistrate Act of 1979, 28 U.S.C. § 636(c), that allows a magistrate to try a civil case and enter a final judgment upon the consent of the parties is constitutional and whether appellants' consent to such a trial was obtained improperly.[1] For reasons given below, we hold that this

[1] 28 U.S.C. § 636(c) provides, in pertinent part:

Notwithstanding any provision of law to the contrary—

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate may exercise such jurisdiction, if such magistrate meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court. In this circumstance, the consent of the parties allows a magistrate designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

(4) Notwithstanding the provisions of paragraph (3) of this subsection, at the time of reference to a magistrate, the parties may

provision is constitutional and that appellants' consent was valid. Accordingly, we affirm the judgment of the district court.

Incredibly, this appeal grows out of an incident that occurred in February 1975 and was the subject of a complaint under 42 U.S.C. § 1983 filed in the district court later that year against the Sheriff of Monroe County and four deputy sheriffs, employed in the Monroe County Jail.[2] For the purposes of this appeal it is not necessary to set forth the facts extensively. It is sufficient to say that the complaint alleged that while appellee Collins was a prisoner in the Monroe County Jail he was severely beaten by police officers, in violation of his constitutional and statutory rights. The case languished until November 1981, when it was tried before a magistrate and a jury. The jury awarded Collins $3,000 in compensatory damages and $60,000 in punitive damages.

Pursuant to 28 U.S.C. § 636(c)(4), appellants appealed from the judgment to the district court, which upheld the

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further consent to appeal on the record to a judge of the district court in the same manner as on an appeal from a judgment of the district court to a court of appeals. Wherever possible the local rules of the district court and the rules promulgated by the conference shall endeavor to make such appeal expeditious and inexpensive. The district court may affirm, reverse, modify, or remand the magistrate's judgment.

(5) Cases in the district courts under paragraph (4) of this subsection may be reviewed by the appropriate United States court of appeals upon petition for leave to appeal by a party stating specific objections to the judgment. Nothing in this paragraph shall be construed to be a limitation on any party's right to seek review by the Supreme Court of the United States.

(6) The court may, for good cause shown on its motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate under this subsection.

2 The complaint also listed among the defendants two unnamed deputy sheriffs. In January 1976, the action against the Sheriff and one of the deputy sheriffs was dismissed.

magistrate's decision in an opinion filed in April 1983. Appellants then sought leave to appeal to this court, under 28 U.S.C. § 636(c)(5), and in August 1983 we denied leave.

A few days earlier, a panel of the Ninth Circuit had held that section 636(c) was unconstitutional. Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc., 712 F.2d 1305 (9th Cir. 1983), rev'd in banc, Nos. 82-3152, 82-3182 (9th Cir. Feb. 16, 1984). As a result of this decision, appellants moved in the district court, under Fed. R. Civ. P. 60(b)(4), to vacate the magistrate's final judgment on the ground that it was "void" because the statute that gave the magistrate jurisdiction was unconstitutional. In November 1983, the district court denied the motion and this expedited appeal followed. The United States has intervened as a party, under 28 U.S.C. § 2403(a), to defend the constitutionality of the challenged provision.

II.

Before addressing the merits of the constitutional argument, we turn to appellants' claim that the trial by the magistrate was improper in a number of other respects. If that were so, there would be no need to consider the constitutionality of section 636(c). Therefore, under well-recognized authority, we should consider the non-constitutional issues first. See Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

Appellants argue first that there was insufficient compliance with the terms of 28 U.S.C. § 636(c)(2). That section, see note 1, provides that after a district judge has designated a full-time magistrate to conduct civil trials, "the clerk of the court shall, at the time the action is filed, notify the parties of their right to consent to the exercise

of such jurisdiction." Appellants point out that since the action here was commenced in 1975, years before enactment of the section in its present form, the clerk of the court did not send such notice when the action was filed or at any subsequent time. Appellants also stress that the notice to them actually came in 1981 from the magistrate, who called the parties and informed them of his availability and asked if they were willing to have the case tried by him. This was followed up by a letter and a subsequent phone call, after which both parties signed a form entitled "Consent to Proceed Before a United States Magistrate."

Appellants argue that the two phone calls and the letter constituted inducement or pressure by the magistrate sufficient to render their consent involuntary. The argument is not persuasive. It takes an uncalled-for leap of imagination to characterize the magistrate's actions as coercion. Similarly without merit is the claim that the notice was defective because it came from the magistrate in 1981 rather than from the clerk in 1975, when the section in question had not yet been enacted. Although the new section applies to proceedings filed before its effective date, cf. White v. Estelle, 556 F.2d 1366, 1368 (5th Cir. 1977), it does not render a proceeding a nullity merely for failure to comply with a technical requirement that was not in existence at the time the section was adopted. Moreover, neither claim now urged by appellants was presented to the magistrate or on direct appeal from his decision to the district court.

III.

We turn now to the merits of the constitutional argument. Here, too, there is a preliminary issue that must be considered. Appellee argues that appellants have waived

their constitutional claim because they never raised it until after the magistrate had tried the case and ordered the entry of judgment on the jury verdict; Chief Judge Curtin had considered the appeal to the district court, in which appellants raised numerous other issues, and had affirmed the magistrate; and this court had denied leave to appeal. Appellants claim that their motion is timely under Fed. R. Civ. P. 60(b)(4), which, they argue, allows collateral attack "within a reasonable time" on a civil judgment on the ground that it is "void." We accept appellants' contention:

> Although the Rule is silent about collateral attack as a method of challenging the validity of a judgment, there can be little doubt that if the judgment is void . . . a collateral attack upon the void judgment may be made in any proceeding in any court where the validity of the judgment comes in issue.

7 Moore's Federal Practice ¶ 60.25[3], at 240 (2d ed. 1983); see Lubben v. Selective Serv. Sys. Local Bd. No. 27, 453 F.2d 645, 649 (1st Cir. 1972); Graciette v. Star Guidance, Inc., 66 F.R.D. 424, 426 (S.D.N.Y. 1975). In their constitutional challenge, appellants assert that the magistrate lacked subject matter jurisdiction in the underlying case and that the parties could not consent to give him jurisdiction. Because this kind of jurisdictional claim could arguably render the judgment void, appellants may press their constitutional claim on collateral attack. See *Graciette*, 66 F.R.D. at 426; 7 Moore's Federal Practice ¶ 60.25[2], at 224.

IV.

Having disposed of these preliminary issues, we proceed to discuss the substance of appellants' constitutional claim. Appellants specifically attack 28 U.S.C. § 636(c)(1), which authorizes magistrates to conduct civil trials and enter final judgments pursuant to the consent of the parties and a reference by the district court. This belated claim is admittedly based upon the decision of a panel of the Ninth Circuit in Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc., supra.

Subsequent to the panel's decision in *Pacemaker*, the Third Circuit reached the opposite conclusion—that section 636(c)(1) is constitutional—in Wharton-Thomas v. United States, 721 F.2d 922 (3d Cir. 1983). More recently, the Ninth Circuit, sitting in banc, reversed the *Pacemaker* panel and held that the consensual referense provision is constitutional. *Pacemaker*, supra, Nos. 82-3152, 82-3182 (9th Cir. Feb. 16, 1984) (in banc). All of these opinions relied on the Supreme Court's opinion in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (plurality opinion), where Justice Brennan, writing for a plurality of four Justices, concluded that section 241(a) of the Bankruptcy Act of 1978, 28 U.S.C. 1471, impermissibly removed "most, if not all, of 'the essential attributes of the judicial power' from the Art. III district court, and . . . vested those attributes in a non-Art. III adjunct." Id. at 87. Before analyzing the constitutional arguments, we briefly review the background of the Federal Magistrate Act of 1979 and the *Northern Pipeline* case.

A. *The Magistrate Statutes*

The Federal Magistrates Act of 1968, 28 U.S.C. §§ 631-639 (amended 1976 & 1979), created magistrate

positions with an eight-year term of office and empowered the district courts to appoint magistrates to serve their districts. Id. § 631(a), (e). Magistrates were authorized to perform the functions previously carried out by United States commissioners, id. § 636(a)(1), to serve as special masters in civil actions, to assist the district court in the conduct of pretrial and discovery proceedings in civil and criminal actions, to make preliminary review of petitions for habeas corpus and to perform such additional duties as "are not inconsistent with the Constitution and laws of the United States," id. § 636(b).

The 1968 Act provided for a magistrate's removal during his term of office for "incompetency, misconduct, neglect of duty, or physical or mental disability." Id. § 631(h) (now codified at § 631(i)). With minor exceptions not relevant here, only the judges of the district court in which the magistrate served could exercise removal authority. Id.

Congress amended the Magistrates Act in 1976, expanding the duties and powers of magistrates. The 1976 amendments empowered magistrates to determine nondispositive pretrial motions subject to review by a district judge under a clearly erroneous or contrary to law standard. The amendments also gave magistrates the authority to make findings and recommendations on dispositive pretrial motions and in prisoner cases. A district judge would then conduct a de novo review of those portions of the magistrate's report or proposed findings or recommendations to which a party objected. 28 U.S.C. § 636(b)(1).

Under the Federal Magistrate Act of 1979, Congress provided that upon the consent of the parties and when specially designated to exercise such authority by the district court in which he serves, a magistrate could also

conduct all proceedings in a jury or non-jury civil action and enter final judgment. 28 U.S.C. § 636(c). This provision, which is reproduced in note 1, is under challenge in this case. As already indicated, any discussion of whether this section is constitutional should begin with an analysis of *Northern Pipeline*.

B. *Northern Pipeline*

The Bankruptcy Act of 1978 established bankruptcy courts "in each judicial district, as an adjunct to the district court for such district." 28 U.S.C. § 151(a). The judges of these courts were to be appointed for 14-year terms by the President with the advice and consent of the Senate. Id. §§ 152, 153(a). They would be subject to removal by the "judicial council of the circuit" on account of "incompetency, misconduct, neglect of duty or physical or mental disability." Id. § 153(b). Their salaries were to be set by statute and subject to adjustment under the Federal Salary Act, 2 U.S.C. §§ 351-361. 28 U.S.C. § 154.

These new courts were granted jurisdiction over all "civil proceedings arising under title 11 [the Bankruptcy title] or arising in or related to cases under title 11." Id. § 1471(b),(c). Bankruptcy courts were vested with all of the "powers of a court of equity, law, and admiralty," except that they could not "enjoin another court or punish a criminal contempt not committed in the presence of a judge of the court or warranting a punishment of imprisonment." Id. § 1481.[3]

[3] The provisions of the Bankruptcy Act described above were not to become effective until April 1, 1984. Congress, however, provided for a transition period before the new provisions took full effect. The *Northern Pipeline* plurality found that the transition rules gave bankruptcy judges "essentially all of the jurisdiction and powers" that they would acquire in 1984. *Northern Pipeline*, 458 U.S. at 56.

The plurality in *Northern Pipeline* easily concluded that "the bankruptcy judges whose offices were created by the Bankruptcy Act of 1978 do not enjoy the protections constitutionally afforded to Art. III judges." 458 U.S. at 60. It then examined two arguments that the appellants in that case presented in support of the constitutionality of the Bankruptcy Act. First, the plurality discussed whether the bankruptcy courts could be viewed as legislative courts, established pursuant to Congress' enumerated Article I powers. Id. at 63. Second, it discussed whether the bankruptcy courts could be viewed as proper adjuncts to the district courts and whether the delegation of certain adjudicative functions to bankruptcy judges "is accordingly consistent with the principle that the judicial power of the United States must be vested in Art. III courts." Id. at 76-77. Dealing with the first argument, the plurality identified three situations in which Article III does not bar the creation of legislative (Article I) courts. Congress, it stated, could create courts for the territories (and for the District of Columbia), could establish and administer courts martial and could create courts to adjudicate cases involving "public rights." The plurality then concluded that bankruptcy courts could not be created pursuant to Congress' Article I powers under any of these three exceptions. Id. at 63-76.

In this case, neither appellee nor the government argue that the magistrate statutes created legislative courts. Thus, we will focus on the second argument advanced in *Northern Pipeline* in support of the Bankruptcy Act of 1978, that is, that the bankruptcy courts could be viewed as proper adjuncts to the district courts. The *Northern Pipeline* plurality dealt with this argument by analyzing two cases in which the Court had held that the delegation in question was constitutional: Crowell v. Benson, 285

U.S. 22 (1932), and United States v. Raddatz, 447 U.S. 667 (1980). *Crowell* involved the use of administrative agencies as factfinders for the adjudication of Congressionally-created, "public" rights. The plurality found that

> while *Crowell* certainly endorsed the proposition that Congress possesses broad discretion to assign factfinding functions to an adjunct created to aid in the adjudication of congressionally created statutory rights, *Crowell* does not support the further proposition . . . that Congress possesses the same degree of discretion in assigning traditionally judicial power to adjuncts engaged in the adjudication of rights *not* created by Congress.

458 U.S. at 81-82.

Because appellee in this case has alleged violations not only of statutory, but also of constitutional rights, the reference to the magistrate must meet standards more stringent than those of *Crowell* if it is to survive constitutional scrutiny. See id. at 82 & n.34, 83. Thus, the discussion in *Northern Pipeline* of *Raddatz*, where the Court upheld a district judge's reference of a pretrial motion to a magistrate, is more relevant to our analysis. The *Northern Pipeline* plurality stated that the reference challenged in *Raddatz* was upheld because the magistrate "was subject to sufficient control by an Art. III district court." Id. at 79. In fact, the *Raddatz* Court had concluded that "the ultimate decisionmaking authority . . . clearly remained with the district court." Id. The *Northern Pipeline* plurality then proceeded to identify the interest that would be adversely affected if the district court did not retain sufficient control as "the principle of separation of powers reflected in Art. III." Id. at 83. The plurality found that the "constitutional system of checks

and balances is designed to guard against encroachment or aggrandizement' by Congress at the expense of the other branches of government." Id. It then concluded that since bankruptcy courts would sometimes adjudicate "rights recognized by the Constitution," id., the sources of the control that Congress would have over those courts could not be seen "merely as incidental extensions of Congress' power to define rights that it has created." Id. at 84. Instead, such extensions of legislative power "suggest unwarranted encroachments upon the judicial power of the United States, which our Constitution reserves for Art. III courts." Id.

With this background in mind, we proceed to discuss the constitutionality of the consent provision of section 636(c).

C. *Separation of Powers*

We first find that unlike the provision of the Bankruptcy Act challenged in *Northern Pipeline*, section 636(c) does not violate the constitutional scheme of separation of powers. We are cognizant, of course, that in discussing this question, the *Northern Pipeline* plurality relied on *Raddatz* and stressed that in that case, even though a magistrate had conducted part of the proceeding, "the ultimate decisionmaking authority . . . clearly remained with the district court." 458 U.S. at 79. Appellants argue that because section 636(c) allows magistrates to enter final judgments, the language just quoted from *Northern Pipeline* indicates that the section is constitutionally infirm. To evaluate this argument, we have to focus on the principles that were at stake in that case.

The *Northern Pipeline* plurality, as we have already discussed in the previous section of this opinion, made clear that its concern was over separation of powers. It

acknowledged "the literal command of Art. III, assigning the judicial power of the United States to courts insulated from Legislative or Executive interference," id. at 64, and that while this command was not absolute, it was subject to only limited exceptions, id. at 63-64. The plurality then attempted to draw the line between "permissible extensions of legislative power and impermissible incursions into judicial power," id. at 83 n.35, and concluded that Congress had made "substantial inroads" into functions that the Constitution reserved to Article III judges, id. at 84.

Given these principles, it follows that the reason the *Northern Pipeline* plurality emphasized that "ultimate decisionmaking authority" remained with the district court was that such control would make it impossible for other branches to "encroach" on judicial functions. But while "ultimate decisionmaking authority" is a sufficient condition for a finding that a challenged scheme does not offend the policy of separation of powers, it is not a necessary condition for such a finding. What we must decide is whether section 636(c) impermissibly allows district judges to place magistrates under the control of the executive or legislative branches. This conclusion follows directly from the language used by the *Northern Pipeline* plurality at the end of its discussion of *Raddatz*:

> Thus, in *Raddatz* there was no serious threat that the exercise of the judicial power would be subject to incursion by other branches. "[T]he only conceivable danger of a 'threat' to the 'independence' of the magistrate comes from within, rather than without the judicial department."

Northern Pipeline, 458 U.S. at 79 n.30 (quoting *Raddatz*, 447 U.S. at 685 (Blackmun, J., concurring)); see *Whar-*

ton-Thomas, supra, 721 F.2d at 927 (magistrates "are not subjected to pressures from the legislature").

The relevant question then is whether section 636(c) changes the nature of the pressures on the independence of magistrates. We find that it does not. The major difference between *Raddatz* and this case is that when the parties consent, the magistrate can now order the entry of judgment. 28 U.S.C. § 636(c)(1). Unlike the situation in *Raddatz*, there is no possibility of de novo review by the district court. See *Raddatz*, 447 U.S. at 676-77. But the other factors deemed important in *Northern Pipeline*, see 458 U.S. at 79, are present in adjudications under section 636(c). First, magistrates "must be specially designated to exercise such jurisdiction by the district court." 28 U.S.C. § 636(c)(1). Second, the method of appointment, id. § 631(a) and removal, id. § 631(i), of magistrates was not affected by the 1979 Act; both responsibilities continue to be entrusted to the district court. Finally, the district court retains the power to withdraw the reference. Id. § 636(c)(6). Thus, to the extent that the section 636(c) scheme differs from the arrangement in *Raddatz*, it does so by authorizing district judges to delegate more authority to magistrates. (In the following section, we consider the constitutional implications of this additional delegation.) Section 636(c), however, does not affect the allocation of power between Congress and the district courts. The factors that seem to have concerned the *Northern Pipeline* plurality—that bankruptcy judges were not appointed by the district court and could not be removed by the district court, that bankruptcy courts were vested with independent jurisdiction and that district courts could not withdraw cases from bankruptcy courts, see *Northern Pipeline*, 458 U.S. at 79-80 n.31—are simply not present

in adjudications under section 636(c), in the same way that they were not present in *Raddatz*.

Appellants argue that threats to judicial independence from within the judicial branch may be as dangerous as threats from other branches. See Note, Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act, 80 Colum. L. Rev. 560, 591 (1980). They suggest that the statement in the *Northern Pipeline* plurality that "[t]he guarantee of life tenure insulates the individual judge from improper influence not only by other branches but by colleagues as well," 458 U.S. at 59 n.10, casts doubt on the constitutionality of section 636(c). However, concerns about pressures from within the judiciary do not involve the question that was the focus of the *Northern Pipeline* plurality's inquiry, namely, separation of powers. See *Wharton-Thomas*, supra, 721 F.2d at 927. Moreover, the *Northern Pipeline* plurality itself explicitly refused to assign any constitutional significance to such internal pressures, 458 U.S. at 79 n.30; id. at 80 n.31, and distinguished them from considerations that raise separation of powers problems, id. at 59 & n.10. To the extent that non-constitutional, policy considerations are at stake, we defer to the judgment of Congress.

D. *Delegation of Judicial Power*

Turning to the next constitutional issue raised by this case, we find that references to magistrates under section 636(c) do not violate an Article III ban against the delegation of judicial power to individuals who are not Article III judges. The landmark challenge to the constitutionality of delegation to magistrates is *United States v. Raddatz*, supra. In that case, the district court referred a suppression motion to a magistrate and ordered the

magistrate to conduct an evidentiary hearing pursuant to 28 U.S.C. § 636(b)(1)(B). The defendant objected to this reference. Litigant consent, however, is not a necessary condition for section 636(b)(1)(B) references—as it is for section 636(c) references—and the district court overruled the objection. Section 636(b)(1)(B) references also differ from § 636(c) references in another significant way: under section 636(b)(1)(B), the magistrate does not decide the motions referred to him, but instead submits "proposed findings of fact and recommendations" to the district court. The section further provides that a district judge "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made."

The defendant in *Raddatz* challenged the reference on statutory and constitutional grounds. The Court first concluded that the statute did not call for a de novo "hearing" and that a de novo "determination" was sufficient. 447 U.S. at 676. Given this construction, it proceeded to analyze whether the statute violated the due process clause of the Fifth Amendment, id. at 677-81, an issue that we discuss in the next section of this opinion, or Article III of the Constitution, id. at 681-84. Discussing the latter question, the Court noted that

> the statute permits the district court to give to the magistrate's proposed findings of fact and recommendations "such weight as [their] merit commands and the sound discretion of the judge warrants."

Id. at 683 (quoting Mathews v. Weber, 423 U.S. 261, 275 (1976)). The Court concluded, however, that such "delegation does not violate Art. III so long as the ultimate decision is made by the district court." 447 U.S. at 683.

Appellants focus on the limiting clause and suggest that it requires us to find that section 636(c) is unconstitutional.

The *Raddatz* Court, however, did not address the question that is before us in this case. The Court stated:

> We need not decide whether, as suggested by the Government, Congress could constitutionally have delegated the task of rendering a final decision on a suppression motion to a non-Art. III officer. Congress has not sought to make any such delegation.

Id. at 681 (citation omitted); see id. at 673 (labeling suppression motion as case-"dispositive"). In fact, the question that *Raddatz* reserved is more difficult than the one we need to address in this case. The proposition that the government advanced in *Raddatz* was that delegation to magistrates would be constitutional even in the absence of consent; all that appellee needs to show here is that the delegation is constitutional when the parties consent to the reference.

Like *Raddatz*, Mathews v. Weber, 423 U.S. 261 (1976), fails to advance the argument that magistrates who receive section 636(c) references are not proper adjuncts to the district court. In that case, the Court upheld a district court's practice of referring all Social Security benefit cases to magistrates for review and preparation of a recommended decision. In dictum, the Court stated that "[t]he authority—and the responsibility—to make an informed, final determination . . . remains with the judge." *Weber*, 423 U.S. at 271, quoted in *Raddatz*, 447 U.S. at 682. The Court, however, explicitly noted that it was deciding the case on statutory grounds, and that it was not considering the constitutionality of the delegation of judicial power. *Weber*, 423 U.S. at 269 & n.5. In fact, the petitioner in that case, the Secretary of Health,

Education, and Welfare, "expressly decline[d] to rely on any constitutional argument" in his challenge to the reference. Id. at 269 n.5.

Similarly, the constitutionality of delegation was not at issue in an earlier magistrates case, Wingo v. Wedding, 418 U.S. 461 (1974). There, the Court held that district judges have a statutory duty under 28 U.S.C. § 2243 to "personally hold evidentiary hearings in federal habeas corpus cases," id. at 472, and thus could not delegate this function to magistrates. The holding in *Wedding* was later overruled by the 1976 amendments to the Federal Magistrates Act. See 28 U.S.C. § 636(b)(1)(B).

In summary, in *Raddatz*, *Weber* and *Wedding*, the Court did not consider the delegation question that is before us in this case. In recent years, however, several circuit courts have addressed the constitutionality of the reference of cases to magistrates for trial. For example, in DeCosta v. CBS, 520 F.2d 499 (1st Cir. 1975), cert. denied, 423 U.S. 1073 (1976), the First Circuit held that "it is *constitutionally* and statutorily permissible to refer cases, with the consent of all parties, for initial decisions" to magistrates. Id. at 507-08 (emphasis added). Cf. Sick v. City of Buffalo, 574 F.2d 689, 690 n.6 (2d Cir. 1978) ("[T]here is no ostensible reason for preventing consent to a jury trial before a magistrate or master, assuming the propriety of the appointment in the first instance."). *DeCosta* also held that the findings of fact in the magistrate's report should be reviewed under the "clearly erroneous" standard and that his legal conclusions should be subject to full review. 520 F.2d at 508-09.

The consensual reference of a case for trial by a magistrate was also upheld in Muhich v. Allen, 603 F.2d 1247 (7th Cir. 1979). In that case, the Seventh Circuit stated:

> Thus, when a civil case properly within the jurisdiction of an article III court is tried before a magistrate pursuant to an order of reference by the district court, jurisdiction remains vested in the district court and is merely exercised through the medium of the magistrate. In this case, the district court retained its jurisdiction over the litigation by exercising its supervisory powers in the form of *de novo* review, and by invoking its exclusive authority to order the entry of final judgment. The strictures of article III were therefore satisfied.

Id. at 1251 (citations omitted). In *Muhich*, the district court had conducted a de novo review; thus, the Seventh Circuit did not have to face the broader delegation question that is before us in this case. Cf. Calderon v. Waco Lighthouse for the Blind, 630 F.2d 352 (5th Cir. 1980) (finding *statutory* requirement that in references under 28 U.S.C. § 636(b)(3), the district court make a de novo determination of the magistrate's findings).

While *Wharton-Thomas* and the in banc decision in *Pacemaker*, supra, are direct support for our conclusion that section 636(c) is constitutional, the earlier cases just mentioned are also important for our purposes. *DeCosta*, in particular, came close to deciding the question that is now before us. While the magistrate there could not enter a final judgment, his report was subject to the same standard of review as that accorded on appeal to a magistrate's judgment pursuant to setion 636(c). See 28 U.S.C. § 636(c)(4) (providing that appeal from magistrate to district court shall be conducted like appeal from district court to court of appeals); id. § 636 (c)(3) (providing that for purposes of direct appeal to court of appeals judgment of magistrate shall be treated in the same manner as judgment of district court). In addition, even

under section 636(c) references, the contempt powers remain with the district court. Id. § 636(e). Thus, the differences between the report of the magistrate in *DeCosta* and a section 636(c) judgment are, for the most part, differences of form and not of substance.

It is also important to note that the references at issue in *DeCosta* and *Muhich* took place before the adoption of section 636(c), pursuant to the more general provision of 28 U.S.C. § 636(b)(3): "A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." The argument for constitutionality is now stronger, since Congress has specifically authorized the references in question after giving serious consideration to the constitutional arguments, S. Rep. No. 74, 96th Cong., 1st Sess. 4, reprinted in 1979 U.S. Code Cong. & Ad. News 1469, 1473; H.R. Rep. No. 287, 96th Cong., 1st Sess. 7-9 (1979). See, e.g., *Northern Pipeline*, 458 U.S. at 61; Fullilove v. Klutznick, 448 U.S. 448, 472-73 (1980).

Our inquiry, however, does not stop here. While we agree with the holding in *DeCosta*, we do not find it necessary to adopt the reasoning advanced by that opinion, see 520 F.2d at 505, and by the government in this case, that delegation to magistrates can be analogized to delegation to arbitrators. Appellants argue that the analogy is not helpful because arbitrators are hired and paid by the parties, and are wholly "outside" the district court. To the extent that the district court does not "refer" cases to arbitrators, who are instead chosen exclusively by agreement of the parties, it would appear that arbitration does not involve the same type of delegation of judicial power as we have in this case. See *Pacemaker*, supra, 712 F.2d at 1311, rev'd in banc on other grounds, Nos. 82-3152, 82-3182 (9th Cir. Feb. 16, 1984). We find more

instructive the analogy to special masters, who, like magistrates, are properly seen as adjuncts to the district court.

Under Fed. R. Civ. P. 53(b), the district judges may refer pending civil cases to masters. Pursuant to such references, a master may take evidence and conduct hearings, Fed. R. Civ. P. 53(c), and must file with the district court a report normally containing his findings of fact and conclusions of law. Fed. R. Civ. P. 53(e)(1). In nonjury cases, the district judge must accept the master's findings of fact unless they are "clearly erroneous." Fed. R. Civ. P. 53(e)(2). The master's legal conclusions, however, are entitled to no special deference. See, e.g., Fogel v. Chestnutt, 668 F.2d 100, 116-17 (2d Cir. 1981), cert. denied, 103 S.Ct. 65 (1982); Oil, Chemical & Atomic Workers Int'l Union v. NLRB, 547 F.2d 575, 580 (D.C. Cir. 1976), cert. denied, 431 U.S. 966 (1977). In addition, if the parties consent, the master's findings of fact can be final. Fed. R. Civ. P. 53(e)(4).

It is true that in La Buy v. Howes Leather Co., 352 U.S. 249, 259 (1957), the Supreme Court held that references to masters should take place only under "exceptional circumstances." But in *La Buy*, the Court merely construed Fed. R. Civ. P. 53(b), which provides that "[a] reference to a master shall be the exception and not the rule." The Court did not suggest that more delegation would be unconstitutional, but merely that it was not authorized by Congress and would be undesirable on policy grounds, id. at 253 n.5, 259; see Cruz v. Hauck, 515 F.2d 322, 330 (5th Cir. 1975) ("The ineluctable conclusion is that the 'exceptional condition' limitation results from the deficiencies of the master system rather than from constitutional limitations upon non-Article III judges."), cert. denied, 424 U.S. 917 (1976). In contrast,

not only does section 636(c) provide an adequate statutory basis for delegation, but it also eliminates many of the defects of the master system that influenced the Supreme Court in *La Buy*: "the expense of the procedure to the litigants, the likelihood of delays in the litigation, the use of attorneys appointed on an *ad hoc* basis, a master's lack of experience in judicial work, and the potential conflicts in the master's time and interests." McCabe, The Federal Magistrate Act of 1979, 16 Harv. J. Legis. 343, 373 (1979); see Silberman, Masters and Magistrates—Part II: The American Analogue, 50 N.Y.U. L. Rev. 1297, 1328 (1975); Comment, An Adjudicative Role for Federal Magistrates in Civil Cases, 40 U. Chi. L. Rev. 584, 588 (1973). In addition, Congress can be viewed as having found implicitly that the overcrowding of district court dockets gives rise to "exceptional circumstances" justifying delegation to magistrates in the types of cases covered by section 636(c). See Silberman, supra, 50 N.Y.U. L. Rev. at 1332 & n.197.

The analogy to masters is not perfect because masters cannot order the entry of final judgment. As we have stated in our discussion of *DeCosta*, however, the presumptions attached to a master's report make the scope of the delegation very similar to that authorized by section 636(c). Cf. McCabe, supra, 16 Harv. J. Legis. at 371 ("In essence, then, a trial judge who has appointed a special master in a nonjury civil case has transformed his role into that of an appellate court, at least with regard to the resolution of factual issues"). In fact, Fed. R. Civ. P. 53(e)(4), which allows the parties to agree to make the master's factual findings final, involves more delegation of judicial power than that at issue under section 636(c). Finally, we stress that we do not need to rely wholly on the analogy between a magistrate's judgment under 28

U.S.C. § 636 and a master's report under Fed. R. Civ. P. 53(b) because all section 636 references are consensual. The issue of consent is significant to our discussion for several reasons.

First, while appellants correctly argue that parties may not confer jurisdiction on a court by consent, consent can, in certain cases, be a necessary condition for the exercise of jurisdiction. For example, under the Bankruptcy Act of 1898, bankruptcy referees could not try actions that did not involve property in the actual or constructive possession of the bankruptcy court, except by consent. 11 U.S.C. § 46(b)(repealed 1978); see MacDonald v. Plymouth County Trust Co., 286 U.S. 263, 266 (1932). In fact, all four opinions filed in *Northern Pipeline* noted the importance of consent in this context. See 458 U.S. at 80 n.31 (plurality opinion) ("Before the [1979] Act the referee had no jurisdiction" under 11 U.S.C. § 46(b) "*except with consent.*"); id. at 91 (Rehnquist, J., concurring) ("I would, therefore, hold so much of the Bankruptcy Act of 1978 as enables a Bankruptcy Court to entertain and decide Northern's lawsuit *over Marathon's objection* to be violative of Art. III of the United States Constitution"); id. at 92 (Burger, C.J., dissenting) (stating that absence of consent was central to Court's holding); id. at 95 (White, J., dissenting) (arguing that Court's holding should be limited to cases not involving consent) (emphasis added).

Second, consent can affect the limits of permissible delegation. This proposition was expressed most clearly by the Supreme Court in Kimberly v. Arms, 129 U.S. 512 (1889). In that case, the Court stated:

> It is not within the general province of a master to pass upon all the issues in an equity case, nor is it competent for the court to refer the entire issue to

> him without the consent of the parties. . . . But when the parties consent to the reference of a case to a master or other officer to hear and decide all the issues therein, and report his findings, both of fact and of law, and such reference is entered as a rule of the court, the master is clothed with very different powers from those which he exercises upon ordinary references, without such consent.

Id. at 524. It then stated that the master's findings in a consensual reference would be "taken as presumptively correct" and subject to review "when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise." Id. The same concept is embodied in Fed. R. Civ. P. 53(e), which provides for a different standard of review of a master's report when the reference is consensual.

Third, the consent provision of section 636(c) provides a constraint against the wholesale delegation of judicial power to adjuncts of the district court. Thus, it helps ensure that the delegation will not reach a magnitude that would trigger Article III concerns. See Note, Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View, 88 Yale L.J. 1023, 1038 (1979) (Article III requires at least "some delegation constraints").

E. *Due Process*

In *Raddatz*, the Court considered whether the reference of a suppression motion, over defendant's objection, to a magistrate violated a due process right to have a case heard before an Article III judge. The Court stated that the guarantees of due process call for a "hearing appropriate to the nature of the case." 447 U.S. at 677. It

concluded that the reference did not violate the defendant's due process rights. Id. at 680. *Raddatz* did not address the question whether the reference of a civil case for trial and entry of final judgment would violate the due process rights of the parties. In this case, we need not deal with that question either, because all references under 28 U.S.C. § 636(c) are by consent of the parties. We find that to the extent that litigants may have a due process right to appear before an Article III judge in a civil case, they may freely waive that right. Indeed, the Supreme Court has held that important constitutional rights may be waived even in criminal cases, which generally raise more troubling due process problems. See, e.g., Patton v. United States, 281 U.S. 276, 312 (1930) (waiver of right to jury trial); Adams v. United States, 317 U.S. 269, 275 (1942) (waiver or right to counsel); see also Fed. R. Civ. P. 38(d) (right to jury trial in civil cases automatically waived unless affirmatively exercised). As we have already stated, we do not think that appellants were coerced into consenting to the reference, and we find that the procedures used to protect the voluntariness of the consent were adequate.

The judgment of the district court is affirmed.

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

HOWARD V. COLLINS,

Plaintiff

-v- CIV -75-139C

WILLIAM FOREMAN, VINCENT PILLETTERS,
and TERRY WARDEN,

Defendant(s)

SIR/MADAM: Take notice of an ORDER, of which the within is a copy, duly granted in the within entitled action on the 8th day of November, 1983, and entered in the Office of the Clerk of the United States District Court, Western District of New York on the 8th day of November, 1983.

Dated: Buffalo, New York

November 8, 1983

JOHN K. ADAMS, CLERK
U.S. District Court
Western District of New York
U.S. Courthouse
Buffalo, New York 14202

TO: Alfred P. Kremer, Esq.
James A. Valenti, Esq.
Nira T. Kermisch, Esq.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

HOWARD V. COLLINS,

Plaintiff,

-vs- CIV-75-139C

WILLIAM FOREMAN, VINCENT PILLETTERS, and TERRY WARDEN,

Defendants.

Defendants ask this court to set aside the judgment entered December 14, 1981, Fed.R.Civ.P. 60(b)(4). Defendants further seek a stay of the enforcement of that judgment. Fed.R.Civ.P. 62(b).

The parties consented to a jury trial of this civil rights action before a United States Magistrate, 28 U.S.C. §636(c). The jury found liability on the part of some of the defendants, which included the payment of both compensatory and punitive damages.

In an appeal pursuant to 28 U.S.C. §636(c)(4), this court affirmed the judgment by decision and order dated April 22, 1983. Although defendants filed for appeal to the United States Court of Appeals for the Second Circuit, they neglected to include any attack on the constitutionality of the Magistrate's power to conduct jury trials. An order denying leave to appeal was made on August 12, 1983, but neither plaintiff nor defendant-appellants were notified until October 11, 1983.

Between the time of actual denial of appeal in August and notification in October, the defendant-appellants attempted to amend their petition to include an allegation that 28 U.S.C. §636 is unconstitutional, citing the August 5, 1983, Ninth Circuit decision in Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc., ____ F.2d ____, 52 U.S.L.W. 2105 (9th Cir. 1983). Of course, post-decision amendment was then impossible.

Since the Second Circuit has not yet addressed the constitutionality of trials by consent before a Magistrate, defendants' motion to vacate the judgment is denied. Defendants shall have a continued stay of the enforcement of the judgment for a period of 15 days from the date of this order. This stay should give the defendants ample time to apply to the Second Circuit for a stay, pending further action by that court.

So ordered.

JOHN T. CURTIN
United States District Judge

Dated: November 8, 1983

28 U.S.C. § 631 ET SEQ.
CHAPTER 43 - UNITED STATES MAGISTRATES

§ 631. Appointment and tenure

(a) The judges of each United States district court and the district court of the Virgin Islands shall appoint United States magistrates in such numbers and to serve at such locations within the judicial district as the conference may determine under this chapter. In the case of a magistrate appointed by the district court of the Virgin Islands, this chapter shall apply as though the court appointing such magistrate were a United States district court. Where there is more than one judge of a district court, the appointment, whether an original appointment or a reappointment, shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge. Where the conference deems it desirable, a magistrate may be designated to serve in one or more districts adjoining the district for which he is appointed. Such a designation shall be made by the concurrence of a majority of the judges of each of the district courts involved and shall specify the duties to be performed by the magistrate in the adjoining district or districts.

(c) A magistrate may hold no other civil or military office or employment under the United States: *Provided, however,* That, with the approval of the conference, a part-time referee in bankruptcy or a clerk or deputy clerk of a court of the United States may be appointed and serve as a part-time United States magistrate, but the conference shall fix the aggregate amount of compensation to be received for performing the duties of part-time magistrate and part-time referee in bankruptcy, clerk or deputy clerk: *And provided further*, That retired officers and retired enlisted personnel of the Regular and Reserve components of the Army, Navy, Air Force, Marine Corps, and Coast Guard, members of the Reserve components of the Army, Navy, Air Force, Marine Corps, and Coast Guard, and members of the Army Na-

tional Guard of the United States, the Air National Guard of the United States, and the Naval Militia and of the National Guard of a State, territory, or the District of Columbia, except the National Guard disbursing officers who are on a full-time salary basis, may be appointed and serve as United States magistrates.

(d) No individual may serve under this chapter after having attained the age of seventy years: *Provided, however*, That upon the unanimous vote of all the judges of the appointing court or courts, a magistrate who has attained the age of seventy years may continue to serve and may be reappointed under this chapter.

(e) The appointment of any individual as a full-time magistrate shall be for a term of eight years, and the appointment of any individuals as a part-time magistrate shall be for a term of four years, except that the term of a full-time or part-time magistrate appointed under subsection (j) shall expire upon —

(1) the expiration of the absent magistrate's term,

(2) the reinstatement of the absent magistrate in regular service in office as a magistrate,

(3) the failure of the absent magistrate to make timely application under subsection (i) of this section for reinstatement in regular service in office as a magistrate after discharge or release from military service,

(4) the death or resignation of the absent magistrate, or

(5) the removal from office of the absent magistrate pursuant to subsection (h) of this section,

whichever may occur first

(f) Upon the expiration of his term, a magistrate may, by a majority vote of the judges of the appointing district court or courts and with the approval of the judicial council of the circuit, continue to perform the duties of his office until his successor is appointed, or for 60 days after the date of the expiration of the magistrate's term, whichever is earlier.

(g) Each individual appointed as a magistrate under this section shall take the oath or affirmation prescribed by section 453 of this title before performing the duties of his office.

(h) Each appointment made by a judge or judges of a district court shall be entered of record in such court, and notice of such appointment shall be given at once by the clerk of that court to the Director.

(i) Removal of a magistrate during the term for which he is appointed shall be only for incompetency, misconduct, neglect of duty, or physical or mental disability, but a magistrate's office shall be terminated if the conference determines that the services performed by his office are no longer needed. Removal shall be by the judges of the district court for the judicial district in which the magistrate serves; where there is more than one judge of a district court, removal shall not occur unless a majority of all the judges of such court concur in the order of removal; and when there is a tie vote of the judges of the district court on the question of the removal or retention in office of a magistrate, then removal shall be only by a concurrence of a majority of all the judges of the council. In the case of a magistrate appointed under the third sentence of subsection (a) of this section, removal shall not occur unless a majority of all the judges of the appointing district courts concur in the order of removal; and where there is a tie vote on the question of the removal or retention in office of a magistrate, then removal shall be only by a concurrence of a majority of all the judges of the council or councils. Before any order or removal shall be entered, a full specification of the charges shall be furnished to the magistrate, and he shall be accorded by the judge or judges of the removing court, courts, council, or councils an opportunity to be heard on the charges.

§ 633. Determination of number, locations, and salaries of magistrates

(a) Surveys by the Director. —

(l) The Director shall, within one year immediately following the date of the enactment of the Federal Magistrates Act, make a careful survey of conditions in judicial districts to determine (A) the number of appointments of full-time magistrates and part-time magistrates required to be made under this chapter to provide for the expeditious and effective administration of justice, (B) the locations at which such officers shall serve, and (C) their respective salaries under section 634 of this title. Thereafter, the Director shall, from time to time, make such surveys, general or local, as the conference shall deem expedient.

(2) In the course of any survey, the Director shall take into account local conditions in each judicial district, including the areas and the populations to be served, the transportation and communications facilities available, the amount and distribution of business of the type expected to arise before officers appointed under this chapter (including such matters as may be assigned under section 636(b) of this chapter), and and other material factors. The Director shall give consideration to suggestions from any interested parties, including district judges, United States commissioners or officers appointed under this chapter, United States attorneys, bar associations, and other parties having relevant experience or information.

(3) The surveys shall be made with a view toward creating and maintaining a system of full-time United States magistrates. However, should the Director find, as a result of any such surveys, areas in which the employment of a full time magistrate would not be feasible or desirable, he shall recommend the appointment of part-time United States magistrates in such numbers and at such locations as may be required to permit prompt and efficient issuance of process and to permit individuals charged with criminal offenses against the United States to be brought before a judicial officer of the United States promptly after arrest.

(b) Determination by the conference. — Upon the completion of the initial surveys required by subsection (a) of this section, the Director shall report to the district courts, the councils, and the conference his recommendations concerning the number of full-time magistrates and part-time magistrates, their respective locations, and the amount of their respective salaries under section 643 1 of this title. The district courts shall advise their respective councils, stating their recommendations and the reasons therefor; the councils shall advise the conference, stating their recommendations and the reasons therefor, and shall also report to the conference the recommendations of the district courts. The conference shall determine, in the light of the recommendations of the Director, the district courts, and the councils, the number of full-time United States magistrates and part-time United States magistrates, the locations at which they shall serve, and their respective salaries. Such determinations shall take effect in each judicial district at such time as the district court for such judicial district shall determine, but in no event later than one year after they are promulgated.

(c) Changes in number, locations, and salares. — Except as otherwise provided in this chapter, the conference may, from time to time, in the light of the recommendations of the Director, the district courts, and the councils, change the number, locations, and salaries of full-time and part-time magistrates, as the expeditious administration of justice may require.

§8634. Compenstion.

(a) Officers appointed under this chapter shall receive as full compensation for their services salaries to be fixed by the conference pursuant to section 633 of this title, at rates for full-time and part-time United States magistrates not to exceed the rates now or hereafter provided for full-time and part-time referees in bankruptcy, respectively, referred to in section 40a of the Bankruptcy Act (11 U.S.C. 68(a)), as amended, except that the salary of a part-time United States magistrate shall not be less than $100 nor more than one-half the maximum salary payable to a full-

time magistrate. In fixing the amount of salary to be paid to any officer appointed under this chapter, consideration shall be given to the average number and the nature of matters that have arisen during the immediately preceding period of five years, and that may be expected thereafter to arise, over which such officer would have jurisdiction and to such other factors as may be material. Disbursement of salaries shall be made by or pursuant to the order of the Director.

(b) Except as provided by section 8344, title 5, relating to reductions of the salaries of reemployed annuitants under subchapter III of chapter 83 of such title and unless the office has been terminated as provided in this chapter, the salary of a full-time Unided States magistrate shall not be reduced, during the term in which he is serving, below the salary fixed for him at the beginning of that term.

(c) All United States magistrates, effective upon their taking the oath or affirmation of office, and all necessary legal, clerical, and secretarial assistants employed in the offices of full-time United States magistrates shall be deemed to be officers and employees in the judicial branch of the United States government within the meaning of subsection III (relating to civil service retirement) of chapter 83, chapter 87 (relating to Federal employees' group life insurance), and chapter 89 (relating to Federal employees' health benefits program) of title 5. Part-time magistrates shall not be excluded from coverage under these chapters solely for lack of a prearranged regular tour of duty.

§ 636. Jurisdiction, powers, and temporary assignment

(a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment —

(l) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, impose conditions of release under section 3146 of title 18, and take acknowledgments, affidavits, and depositions; and (3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section.

(b)(1) Notwithstanding any provision of law to the contrary —

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the dispostion, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recomendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties. Within ten days after being served with a copy, and party may serve and file written objections to such-proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in

part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53 (b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate may be assinged such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary —

(l) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate may exercise such jurisdiction, if such magistrate meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate is not reasonably available in accordance with guidelines estahlished by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of the court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from and other judgment of a district court. In this circumstance, the consent of the parties allows a magistrate designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

(4) Notwithstanding the provisions of paragraph (3) of this subsection, at the time of reference to a magistrate, the parties may further consent to appeal on the record to a judge of the district court in the same manner as on an appeal from a judgment of the district court to a court of appeals. Wherever possible the local rules of the district court and the rules promulgated by the conference shall endeavor to make such appeal expeditious and inexpensive. The district court may affirm, reverse, modify, or remand the magistrate's judgment.

(5) Cases in the district courts under paragraph (4) of this subsection may be reviewed by the appropriate United States court of appeals upon petition for leave to appeal by a party stating specific objections to the judgment. Nothing in this para-

graph shall be construed to be a limitation on any party's right to seek review by the Supreme Court of the United States.

(6) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate under this subsection.

(7) The magistrate shall determine, taking into account the complexity of the particular matter referred to the magistrate, whether the record in the proceeding shall be taken, pursuant to section 753 of this title, by electronic sound recording means, by a court reporter appointed or employed by the court to take a verbatim record by shorthand or by mechanical means, or by an employee of the court designated by the court to take such a verbatum record. Notwithstanding the magistrate's determination, (A) the proceeding shall be taken down by a court reporter if any party so requests, (B) the proceedings shall be recorded by a means other than a court reporter if all parties so agree, and (C) no record of the proceeding shall be made if all parties so agree. Reporters referred to in this paragraph may be transferred for temporary service in any district court of the judicial circuit for reporting proceedings under this subsection, or for other reporting duties in such court.

(d) The practice and procedure for the trial of cases before officers serving under this chapter, and for the taking and hearing of appeals to the district courts, shall conform to rules promulgated by the Supreme Court pursuant to section 3402 of title 18, United States Code.

(e) In a proceeding before a magistrate, any of the following acts or conduct shall constitute a contempt of the district court for the district wherein the magistrate is sitting: (1) disobedience or resistance to any lawful order, process, or writ; (2) misbehavior at a hearing or other proceeding, or so near the place thereof as to obstruct the same, (3) failure to produce, after having been ordered to do so, any pertinent document; (4) refusal to appear after having been subpenaed or, upon appearing refusal to take

the oath or affirmation as a witness, or, having taken the oath or affirmation, refusal to be examined according to law; or (5) any other act or conduct which if committed before a judge of the district court would constitute contempt of such court. Upon the commission of any such act or conduct, the magistrate shall forthwith certify the facts to a judge of the district court and may serve or cause to be served upon any person whose behavior is brought into question under this section an order requiring such person to appear before a judge of that court upon a day certain to show cause why he should not be adjudged in contempt by reason of the facts so certified. A judge of the district court shall thereupon, in a summary manner, hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a judge of the court, or commit such person upon the conditions applicable in the case of defiance of the process of the district court or misconduct in the presence of a judge of that court.

(f) In an emergency and upon the concurrence of the chief judges of the districts involved, a United States magistrate may be temporarily assigned to perform any of the duties specified in subsection (a) or (b) of this section in a judicial district other than the judicial district for which he has been appointed. No magistrate shall perform an of such duties in a district to which he has been temporarily assigned until an order has been issued by the chief judge of such district specifying (1) the emergency by reason of which he has been transferred, (2) the duration of his assignment, and (3) the duties which he is authorized to perform. A magistrate so assigned shall not be entitled to additional compensation but shall be reimbursed for actual and necessary expenses incurred in the performance of his duties in accordance with section 635.

(g) A United States magistrate may perform the verification function required by section 4107 of title 18, United States Code. A magistrate may be assigned by a judge of any United States District court to perform the verification required by section 4108 and the appointment of counsel authorized by section 4109 of title 18, United States Code, and may perform such functions beyond the territorial limits of the United States. A magistrate assigned such functions shall have no authority to perform any other function within the territory of a foreign country.